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LIST OF CASES CITED BY PETITIONER

Supreme Court of the United States

October Term, 1924.

No. 63

JAMES C. DAVIS, AGENT OF THE PRESIDENT, UNDER SECTION 206 OF THE TRANSPORTATION ACT, 1920,

Petitioner,

vs.

JOHN O'HARA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PETITIONER.

STATEMENT

On pages 8 and 9 of his brief, the respondent says:

"The questions of whether Respondent was injured by Petitioner's negligence; whether he had assumed the risk; whether Petitioner was engaged in interstate commerce; whether the venue objection was waived by failure to cross-appeal were all finally determined on first appeal.

"On the second appeal of this action Petitioner sought to review these same holdings adjudicated on first appeal. The Supreme Court of Nebraska refused to permit a review of these settled questions, holding that such review should have been sought upon motion for re-

hearing at the time of the first appeal; that the questions had become *res adjudicata* and the law of the case. No new or different decision was rendered on second appeal upon any of these questions nor were they considered nor mentioned other than to apply the rule, *law of the case.*

"A single exception exists to this statement and that is in reference to the venue question. This was discussed from several different angles and several specific waivers of the objection noted. The Supreme Court of Nebraska disposed of the question upon the specific grounds that the former opinion, holding this question to have been foreclosed by failure to cross-appeal, *was also settled under the law of the case* (Rec. p. 202).

"Insofar, then, as all questions arising on first appeal and disposed of on first appeal are concerned they are not proper questions and especially to review in this court under the second trial records procured by Petitioner. Without having obtained a writ of certiarari to review the first trial or any rulings therein, but confining himself to the last trial, Petitioner asks this court to hold that all the findings of the Supreme Court of Nebraska on the *first appeal were* erroneous. Petitioner asks the court to base its review of first trial questions—not on the first trial proceedings—but *upon those of the second trial.* Petitioner's position is a very novel one. How can this court say that the record of evidence on first appeal does not show Petitioner to have been guilty—as found by the Supreme Court of Nebraska—of 'culpable negligence?' How can this court say that the first trial record did not show Respondent to have been engaged in interstate commerce and to not have assumed the risk? How can this court say that the Supreme Court of Nebraska erred in its holding that Petitioner failed to perfect a cross-appeal upon the venue question and that by reason thereof waived such objection even if properly made?

"Another thing of great importance faces Petitioner. That is the decision on second appeal merely applying the rule *law of the case* to these questions *was not the decision of any federal question.* This was a decision upon a non-federal ground—one of general practice.

"We will now treat the matter above discussed by analysis.

"(a) *Proceedings on first trial and appeal not reviewable because not appealed from.*

"The decision upon these questions upon first appeal was final within the meaning of Section 237 of the Judicial Code. A review of these points decided on first appeal can be had only by a review of the first trial proceedings. * * *

"(b) *The decision on second appeal applying the rule law of the case was a decision based upon non-federal ground and therefore not reviewable here.*

* * * * *

"(c) *The proper and exclusive method of reviewing the decision on first appeal was by motion for rehearing, as a foundation for further appeal.*"

The case was tried twice. On the first trial the court, after the parties had introduced their evidence and rested, directed the jury to return a verdict for the defendant and judgment was entered in accordance with the verdict (Addition to Record Pursuant to Order of January 14, 1924, pp. 3-4). The plaintiff filed a motion for a new trial on the statutory grounds, including, among others, the ground that the court erred in directing a verdict for the defendant and also the following additional ground:

"11. Irregularities in the proceedings of defendant in that defendant on or about the 16th day of April, 1920, procured an order in the District Court of Pottawattamie County, Iowa, restraining plaintiff from prosecuting this action; that said restraining order also restrained John O'Hara from further prosecuting this action and that said restraining order was left pending in said court and said action never dismissed and that the same now is pending, though defendant has been enjoined by the District Court of Douglas County, Nebraska, from proceeding further in said suit in Pottawattamie County, Iowa; that the pendency of the Pottawattamie County action has prevented plaintiff from

having a fair trial of his action in this Court, and has embarrassed him in obtaining witnesses and preparing his case, and that by the bringing, maintaining and failing to dismiss said Pottawattamie County action the defendant has been guilty of misconduct to the prejudice of plaintiff's having a fair trial hereof". (Addition to Record, p. 5).

This motion for a new trial was overruled (Addition to Record, p. 6) and the plaintiff appealed to the Supreme Court. It held (par. 3 of the syllabus, R., p. 209), "that it was error for the trial court to instruct the jury to return a verdict in favor of defendant" and reversed the case and remanded it for further proceedings. The court did not pass upon the question of jurisdiction on the first appeal and assigned as its reason for not doing so that this question was not before it because the defendant had failed to prosecute a cross-appeal from the judgment in his favor, as appears from the following quotation from the opinion on the first appeal:

> "Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the director general of railroads set out as a part of the motion provided that suits against the director general of railroads, as authorized by general order No. 50-A should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now (See subdivision b, Rule 18 of this court." (Rec., p. 213).

Under the State practice, the plaintiff's appeal was from the order overruling the motion for a new trial, and when the case was reversed it stood in all respects the same

as if the trial court had ordered a new trial in the first instance. In other words, the appellate proceedings resulted in setting aside the judgment in favor of the defendant and the case then stood as if it had never been tried. There were no final orders against either party.

Cerny v. Paxton & Gallagher Co., 83 Neb. 88. Paragraph one of the syllabus in this case is as follows:

> "Where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact."

On page 90 of the opinion the court says:

> "When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314 of the code (section 8825, Compiled Statutes of 1922) as ground for a new trial, the making of a motion in the district court for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. In such cases the appeal is in effect an appeal from the order refusing a new trial * * *."

The court further says (p. 91):

> "We are satisfied that where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon the issues of fact. The plaintiff cites, and quotes largely from the opinion, in the case of Lisbon v. Lyman, 49 N. H. 553; and it must be conceded that that case sustains the plaintiff's contention to the extent that this court should have upon the former hearing sent back the case for a new trial upon the one question of the measure of damages. The considerations urged by the writer of the opinion in that case would have carried great weight if addressed to a legislative body having the power to take away from the verdict of the jury its omnibus character and provide for specific findings of the different issues submitted

to that body. They fail, however, to convince us that such is the law; and until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We, therefore, must adhere to the rule that, where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact."

Section 314 of the code mentioned above is Section 8825, Compiled Statutes of 1922, and reads as follows:

"A 'new trial' is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party:

"First. Irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

"Second. Misconduct of the jury or prevailing party;

"Third. Accident or surprise, which ordinary prudence could not have guarded against;

"Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice;

"Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property;

"Sixth. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;

"Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial;

"Eighth. Error of law occurring at the trial and excepted to by the party making the application."

The respondent, plaintiff in the action below, asked for a new trial under this section of the statute and the Supreme Court gave him what he asked for. After the Supreme Court reversed the case on the first appeal, there was no judgment, final or otherwise, against the petitioner, defendant below, and there was no final order from which he could prosecute proceedings to this court.

The mandate issued by the Supreme Court on the first appeal, set out at page 21 of the record, omitting the formal parts, recites that it is considered by the Supreme Court that the judgment rendered by the district court "in favor of said defendant and against said plaintiff be reversed at the costs of said defendant taxed at $137.00 and cause remanded for further proceedings. Now, therefore, you are commanded, without delay, to proceed according to law," that is, to try the case *de novo*.

In accordance with the above mandate, the case was tried the second time *de novo*. A jury was empaneled, both parties introduced their evidence, the court instructed the jury, it returned a verdict in favor of the plaintiff for $46,840.11, and the court entered judgment thereon (R., pp. 22-32). The defendant filed a motion for a new trial, which was overruled (R., pp. 33-35), and he appealed to the State Supreme Court. It affirmed the case on condition that the plaintiff remit from his judgment all in excess of $37,500, which was done and the judgment of the District Court in that sum was affirmed (R., pp. 202-203). The defendant filed a motion for rehearing which was overruled. (R., pp. 204-205).

Paragraphs 1 and 2 of the syllabus (which in Nebraska is the law of the case, *Holliday v. Brown*, 34 Neb. 232), read as follows:

"1. There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to.

"2. An action for damages against the director general of railroads under the federal employers' liability act is both local and transitory under general order No. 18-A, and the district courts of this state have jurisdiction over the subject-matter of such an action. Where the director general specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer." (R., p. 196).

In the opinion (R., p. 197) the court says:

"This case is here for the second time. At the first trial evidence was taken and both parties rested. A motion of defendant to direct a verdict in its favor was sustained, and the action dismissed. On appeal to this court the judgment was reversed and the cause remanded for further proceedings. *O'Hara v. Hines*, 108 Neb. 74, 187 N. W. 643. Upon a second trial plaintiff recovered a judgment for $46,840.11, and from this judgment this appeal is taken."

The court further says in the opinion (R., p. 198):

"It is strongly urged that the court had no jurisdiction of the person of defendant or the subject-matter of the action. * * *"

The court further says (R., p. 201):

"It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a general appearance, the court did not acquire jurisdiction."

"Did the district court have jurisdiction of the subject-matter of the action? * * *" This question is answered by the court in the affirmative.

It is the judgment of the State Supreme Court, entered on the second appeal, that is the subject of this proceeding.

ARGUMENT

The above contentions of the respondent are all settled against him by the following decisions of this Court:

Georgia Railway Co. v. Decatur, 262 U. S. 432, was a suit brought to enjoin a proposed increase in street car fares. An interlocutory injunction was granted by the trial court which was affirmed on writ of error by the State Supreme Court. "Thereafter, the case having been remanded, defendants were allowed to amend their answer and crossbill in several particulars. A general demurrer to these amended pleadings was sustained in part; and a jury, impaneled to try the remaining issues, found for the plaintiff by direction of the court, upon which a final decree was entered. A second writ of error from the State Supreme Court followed. That court held that its judgment upon the first writ of error became the law of the case and was *res judicata* and therefore precluded a further review, and the decree of the trial court was affirmed. Deprivation of rights under the Federal Constitution was duly and properly asserted. The case is here on writ of error. * * *" The court says:

> "Preliminarily, defendant in error insists that the decision of the State Supreme Court on the first writ of error affirming the interlocutory order of the trial court, was a final adjudication from which a writ of error from this Court might have been sued out, and, hence, that we are precluded from considering the present writ of error. *Rio Grande Western Ry. Co. v. Stringham,* 239 U. S. 44, is cited and relied upon; but that case furnishes no support to the contention. There the trial court had adjudged the title to a piece of land to be in the defendant. Upon appeal the State Supreme

Court reversed this judgment and remanded the case with directions to enter judgment awarding plaintiff title to a right-of-way over the land. The trial court followed this direction. Plaintiff again appealed, insisting, as it had done before, that it had title in fee simple; but the appellate court declined to consider the question, holding that the former decision concluded the court as well as the parties. This Court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a final decree; and it was upon this decree that the second writ of error was brought. We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect to its own power to again consider the issues, the judgment now under review is the only one this Court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214; *Zeckendorf v. Steinfeld*, 225 U. S. 445, 454. While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this court appellate jurisdiction the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' *Bostwick v. Brinkerhoff*, 106 U. S. 3, and cases cited.

"We hold, therefore, that the writ of error was properly brought and come to a consideration of the substantive matters presented."

C. & O. Ry. Co. v. McCabe, 213 U. S. 207, is clearly and correctly summarized in a note to Section 1214, Compiled Statutes 1916, Vol. 2 (Judicial Code, Section 237) as follows:

> "A judgment affirming, on a third appeal, a judgment entered on a verdict in favor of plaintiff, is the first final judgment in the action which is reviewable, where the highest state court, on the first appeal, reversed the order of the lower court, granting a petition for the removal of the action to a Federal Circuit Court, and remanded the case for trial, and, on the second appeal, reversed a judgment entered on a directed verdict in favor of defendant, though the court, on such third appeal, regarded itself as bound by its prior decision as the law of the case, and declined again to consider the federal question."

The first appeal in the McCabe case was from an order granting a petition for removal to the Federal Court, and the Appellate Court reversed the order and remanded the case for trial.

At page 214 of the opinion the court says:

> "Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the Court of Appeals of Kentucky, to which judgment this writ of error is prosecuted. Nor is it material that the state supreme court regarded itself as bound by the decision in the former appeal as the law of the case and declined in the judgment now under review to again consider the question. The judgment under review was the only final judgment in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser v. Hemphill,* 198 U. S. 173, and cases therein cited."

See also *Bruce v. Tobin,* 245 U. S. 18, and *Louisiana Navigation Co. v. Oyster Commission,* 226 U. S. 99.

In *Zeckendorf v. Steinfeld,* 225 U. S. 445, the court says:

> "Whatever effect the decision of the Supreme Court of a territory may have, as the law of the case, on the lower court or on the Supreme Court itself, prior to an appeal to this court, it is not the law of the case for this court."

In *U. S. v. D. & R. G.,* 191 U. S. 84, 93, the court says:

> "While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

The record shows that the contention of the respondent that the case should be dismissed for lack of a federal question is without merit. The case is brought under the federal Employer's Liability Act and in proceedings brought under this Act,

> "rights and obligations depend upon it and applicable principles of common law as interpreted and applied by federal courts; and negligence is essential to recovery. *Seaboard Air Line Ry. Co. v. Horton,* 233 U. S. 492, 501, 502; *Southern Ry. Co. v. Gray,* 241 U. S. 333, 339; *New York Central R. R. Co. v. Winfield,* 244 U. S. 147, 150; *Erie R. R. Co. v. Winfield,* 244 U. S. 170, 172. * * *"
>
> *New Orleans and N. E. R. R. Co. v. Harris,* 247 U. S. 367, 371.
>
> See also *Central Vermont Ry. Co. v. White,* 238 U. S. 507.

The question raised with respect to the general orders of the Director General is a federal question. A reading of the opinion shows that the state court affirmed the judgment of the District Court because it thought that the plaintiff had proved a case under the federal Employer's Liability Act, and because it thought that the case was both local and transitory under General Order No. 18-A and that the District Court of Nebraska had jurisdiction over the subject-matter of the action although the plaintiff's cause of action arose in Iowa, of which state he was a citizen and resident. The opinion also shows that the State Supreme Court thought that where the Director General appeared specially by filing a motion to quash the summons, as was done in this case (R., p. 6), he entered a voluntary appearance and gave the District Court of Douglas County, Nebraska, jurisdiction, or in other words, that he thereby waived the provisions of General Order No. 18-A, as amended by General Order No. 18-B. It is clear that these are all federal questions.

In addition to this, the suit is against the Director General and is in effect a suit against the United States.

Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554;
Sandoval v. Davis, 278 Fed. 968;
Hines v. Dahn, 267 Fed. 105;
Dahn v. Davis, 258 U. S. 421, 42 Sup. Ct. Rep. 320.

In *DuPont De NeMours* M *Co. v. James C. Davis,* 44 Sup. Ct. Rep. 364, the court says:

> "In taking over and operating the railroad systems of the country, the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain,' *North Carolina R. R. Co. v. Lee,* 260 U. S. 16, 43 Sup. Ct. 2, 67 L. Ed. 104; *Missouri Pacific R. R. Co. v. Ault,* 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087; *Northern Pacific Ry. Co. v. North Dakota,* 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; *In re Tidewater Coal Exchange* (C.C.A.), 280 Fed. 648,

649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. Section 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, *Ches. & Del. Canal Co. v. United States*, 250 U. S. 123, 126, 39 Sup. Ct. 407, 63 L. Ed. 889; *In re Tidewater Coal Exchange, supra;* and therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 81; *United States v. Whited & Wheless*, 246 U. S. 552, 561, 38 Sup. Ct. 367, 62 L. Ed. 879. Statutes of limitation sought to be applied to bar rights of the government must receive a strict construction in favor of the government. *United States v. Whited & Wheless, supra.*"

The rights of the Director General cannot be defeated under the name of local practice.

Nor does the fact that the defendant failed to file a motion for rehearing in the first appeal take this case out of the rule laid down by the above decisions. There is no Nebraska statute which requires a motion for rehearing to be made. The only provision for such a motion is found in a rule of the Supreme Court which provides:

"All motions for rehearing must be printed and may be filed as of course at any time within 40 days from the filing of the opinion or rendition of the judgment of the court in the case, provided that in Workmen's Compensation cases motions for rehearing must be filed within 15 days from date of the filing of the opinion. Such motion must specify distinctly the grounds upon which ti is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rules 12 and 13. Fifteen copies must be filed with the clerk. In original cases where the error assigned

is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 8826, Compiled Statutes, 1922, and may be typewritten.

"No mandate will issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties."

Section 8826, Compiled Statutes, 1922, provides:

"The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

It will be noted that the rule simply permits the filing of a motion for rehearing but does not require it as a prerequisite to appealing from a judgment rendered at a subsequent trial, had in accordance with the mandate entered in cases, such as this, where the case is reversed on the first appeal and remanded for a new trial.

The first appeal was argued twice. The first argument was on May 24, 1921. November 18, 1921, the court ordered a re-argument, which was had January 3, 1922 (Addition to Record, pp. 27-33). Briefs were filed by both parties. The Supreme Court, as stated before, held that the trial court erred in instructing a verdict instead of submitting the case to the jury, and reversed it on this ground. It also held that the jurisdictional question was not before it, because the defendant had not filed a cross-appeal from the judgment in his favor, and the first appeal left this question undecided. The court does not suggest in its

opinion, entered on the second appeal, that there were any grounds upon which it would have granted a motion for a rehearing if it had been filed, but on the contrary maintains that the first decision is correct. Under these circumstances, it is plain that the failure of the defendant to file a motion for a rehearing is immaterial and does not constitute a sufficient ground for the dismissal of this proceeding. See *Pendergast v. N. Y. Tel. Co.*, 262 U. S. 43, 48.

In the recent case of *Davis v. Wechsler*, 263 U. S. 22, this court decided that:

> "Local practice will not be allowed to defeat or to put unreasonable obstacles in the way of a plain and reasonable assertion of federal rights.
>
> "The United States Supreme Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to a federal right, or to bar the assertion of it, even on local grounds."

The Wechsler case was a suit against the Director General for personal injuries received by the plaintiff upon a railroad while it was under federal control. The suit was brought in the Circuit Court of Jackson County, Missouri.

> "The cause of action arose in another county and the plaintiff then and when the suit was brought resided in Illinois. * * *
>
> "The defendant pleaded a general denial and also that the Court was without jurisdiction because of the foregoing facts. The plaintiff by replication relied upon the invalidity of the order, a point now decided against him. * * * On February 25, 1921, the plaintiff amended and John Barton Payne, Director General of Railroads and agent designated by the President under Transportation Act, 1920 (41 Stat. 456), was substituted by agreement as successor of Hines, and according to the record the 'substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant.' It was not disputed and was stated by the Court below

that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defense on the merits, but it was held by the Court of Appeals affirming a judgment for the plaintiff that the provision in General Order 18-A went only to the venue of the action and was waived by the appearance of Payne. A similar effect was attributed to the appearance of the present petitioner, Davis, in the place of Payne. A writ of certiorari was denied by the Supreme Court of the State.

"We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed, when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22, 40, Sup. Ct. 419, 64 L. Ed. 751. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias*, 225 U. S. 246, 32 Sup. Ct. 822, 56 L. Ed. 1074. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American Ry. Express Co. v. Levee*, 44 Sup. Ct. 11, 67 L. Ed. ——, decided this day.

"The Transportation Act of 1920 (Act Feb. 28, 1920,

c. 91, Sec. 206, (a) and (d), 41 Stat. 456, 461, 462) in no way invalidates a defense good when it was passed."

See also *Munter v. Weil Corset Co.*, 261 U. S. 276.

In *Railroad Commission v. Eastern Texas Ry. Co.*, 44 Supreme Court Reporter, 247, 249, the Wechsler case is cited approvingly. See also *Ward v. Love County*, 253 U. S. 17, 22.

In *Hill v. Smith*, 260 U. S. 592, paragraph 1 of the syllabus reads:

"A federal question which was treated as open, and decided, by the State Supreme Court, will be reviewed here without inquiring whether its federal character was adequately called to the attention of the state trial court."

On page 594 of the opinion in this case it is said:

"It is argued for the respondent that there is no jurisdiction in this Court because the attention of the trial judge was not called specifically to the Bankruptcy Act as a ground for the rulings asked, and because, even if it had been, it is said, the burden of proof is to be determined by the practice of the State. As we are of opinion that the judgment was right we shall not discuss these objections at length. We deem it enough to say, as to the first, that the appellate Court treated the question as open and decided it; and as to the second that here, as in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed so flows from the words of the statute—that the ruling upon it may be reviewed here."

In the present case the federal questions, including the question as to the jurisdiction of the court, were asserted by the defendant at the proper time and in the proper man-

ner under the state system of pleading and practice. That part of the decision of the State Supreme Court holding that the Director General waived the benefit of his general order by appearing specially and asking the Court to quash the service was evidently rendered in a spirit of evasion for the purpose of defeating a federal right, as this holding is in direct conflict with all previous Nebraska decisions upon this subject, which, as stated by Judge Letton in his dissenting opinion, the court overrules without mention. (Rec., p. 202).

Prior to the decision in the present case, the Supreme Court of Nebraska in disposing of questions of jurisdiction had by repeated decisions settled the rule of practice in Nebraska to be the same as the Wechsler case discloses the Missouri practice to be, namely, that the defendant had a right to unite a plea to the jurisdiction and a defense on the merits. The Nebraska decisions settling this rule are cited on page twenty of the petitioner's first brief herein, but for the convenience of the court we desire to quote from them more fully than we have done in that brief.

The following decisions of the Supreme Court of Nebraska settle the Nebraska practice to be as stated above.

The case of *Baker v. Union Stock Yards National Bank*, 63 Neb. 801, is in point. The court says, page 803 of the opinion:

> "A succession of well-considered cases has settled the law of this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process, or service thereof, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived. *Omaha Loan & Trust Co. Savings Bank v.*

Knight, 50 Neb. 342; *Ley v. Pilger*, 59 Neb. 561. But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have. *Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Herbert v. Wortendyke*, 49 Neb. 182; *Barry v. Wachosky*, 57 Neb. 534, 535; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728. While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in cases of this character. No special appearance or preliminary objections were made in *Hurlburt v. Palmer, supra*, or *Herbert v. Wortendyke, supra*, and the provisions of sections 94 and 96 of the Code of Civil Procedure, taken together, would seem to make it clear that they were not required. See also *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up by answer, and therefore that it is not waived by any prliminary steps required before raising it in the prescribed way. That such is the proper construction of the Code, is apparent upon consideration of the practice prior to the Code, and a comparison with the holdings of other courts."

In *Stelling v. Peddicord*, 78 Neb. 779, the court holds:

"If a defendant claims that the court has acquired no jurisdiction over his person by reason of defects or irregularities in the process or service thereof, his course is by special appearance and objections to the jurisdiction, and, if he goes further and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process or service thereof, the defects are waived. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801.

"But where for some reason the defendant is privileged from suit in the county where, or at the time when he is sued, he may set up want of jurisdiction of

his person by answer, along with any other defenses he may have, without first making a special appearance or preliminary objections."

On page 781 of the opinion the court says:

"But the second objection is of a different character. It goes more to the venue. It amounts to a claim of immunity from the lawful service of summons in the county where the action was brought. In such case, where the ground of the objection does not appear on the face of the record, the proper practice is to plead to the jurisdiction, and this plea may be joined with a plea to the merits. *Baker v. Union Stock Yards Nat. Bank, supra.* It it not necessary that an objection of this kind should be first urged on special appearance. It would follow, then, that, while the first objection was waived by defendant's general appearance and plea to the merits, the second was available as the basis of a plea to the jurisdiction, and one of the questions now presented is whether the evidence is sufficient to sustain a finding against the defendant on the issues tendered by that plea.

"From the evidence that went to the jury on that issue it conclusively appears that when this suit was instituted the defendant's principal place of business was in the state of Missouri, and that its members resided in that state, and were not in Franklin county. The evidence allows the inference that Chaney, the alleged agent upon whom service was made according to the officer's return, was acting as the defendant's agent in buying horses and mules and shipping them to the defendant in Missouri. His agency, however, was in the nature of a roving commission. He bought whenever he could, and shipped from the most convenient point. He was in charge of no office or place of business owned or kept by the defendant, nor did the defendant own or maintain any place of business in the county in which the venue was laid. In short, there was no place in that county that could be called the defendant's 'usual place of doing business.' Section 24 of the code provides that a copartnership may sue and be sued by the firm name. Section 25 provides that process against

any such company or firm shall be served by a copy left at their usual place of doing business within the county, with one of the members of such company or firm, or with a clerk or general agent thereof. In this case, as both members of the firm were outside the state, service could only be made by a copy left with a clerk or general agent of the defendant at its 'usual place of doing business within the county,' and, as there was no such place, it is clear that service of summons could not be made. The defendant, then, was privileged from suit in that county because it was out of reach of the process of the court. Its plea to the jurisdiction is not a mere technical objection, but is in the nature of a protest against being dragged into a foreign jurisdiction to defend against a suit, and should have been sustained. *Baker v. Union Stock Yards Nat. Bank, supra,* and citations.

"It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

"Duffie and Jackson, C.C., concur.

"By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law. REVERSED."

In *Herbert v. Wortendyke,* 49 Neb. 182, paragraph 2 of the syllabus reads:

"Objections to the jurisdiction which do not arise upon the summons, the indorsement, or service, thereof, or upon the face of the petition, may be raised by answer in connection with matter in bar. *Hurlburt v. Palmer,* 39 Neb. 158, followed."

The court in its opinion reviews a number of cases and concludes as follows (p. 185):

"It is established by these cases, in accordance with the plain language of Sections 94 and 96 of the Code of Civil Procedure, that where a want of jurisdiction does not appear on the face of the record it may be

pleaded by answer in connection with pleas in bar. Here the petition was one in trover, and the facts disclosing the want of jurisdiction did not appear on the face of the record. About seven months after the answer was filed there was filed the following: 'We hereby authorize Bush and Comstrock to appear for us in the above entitled action as our attorneys and to take charge of, manage, and defend the same in our behalf.' This was signed by Wortendyke and Spelts. It is contended that this waived the question of jurisdiction. It was not strictly an appearance but a power of attorney to make an appearance. But aside from that, if want of jurisdiction of the person may be averred by answer in connection with pleas at bar, it follows that one has the right at the same time to defend to the merits and to the jurisdiction, and we cannot see that this paper was any more a general appearance than appearing at the trial and defending to the merits. For the foregoing reasons we think the District Court of Lancaster County was shown by the evidence to be without jurisdiction so far as Wortendyke and Spelts were concerned. * * *"

In *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557, (cited above), it was contended that the defendant had waived the question of jurisdiction. The court says (p. 561):

"The amended petition did not disclose the want of jurisdiction. The defendant did not demur to that, but he answered; and this was the proper method of objecting to the jurisdiction, even of the person of the defendant, where the want of jurisdiction did not appear from the summons, or return, or the petition itself. * * *"

In *Barry v. Wachosky*, 57 Neb. 534, the court holds:

"Where a defendant objects specially to the court's jurisdiction over him and, that being overruled, pleads generally to the merits and interposes as a defense in his answer the facts showing the court's want of jurisdiction, he does not thereby waive the objection that the court had no jurisdiction over him."

In *Stull Bros. v. Powell*, 70 Neb. 152, the court holds:

"A non-resident defendant may join a plea to the merits with a plea to the jurisdiction, where the facts as to the latter are not apparent on the face of the record.

"Where the question of jurisdiction is thus litigated, the non-resident defendant does not, by appealing from a county court's adverse decision, waive his plea to the jurisdiction."

In *Templin v. Kimsey*, 74 Neb. 614, the court holds:

"Where the want of jurisdiction does not appear upon the face of the record, it may be pleaded with other defenses in the answer.

"That the defendant in a case of that kind first raised the question of jurisdiction on a special appearance, which was overruled, does not affect his right to include a plea to the jurisdiction with other defenses in his answer."

In *Hurlburt v. Palmer*, 39 Neb. 158, the court considers the question as to whether or not the defendant waives the objection to being sued in a wrong jurisdiction by joining in the answer with the defense as to the jurisdiction, such other defenses as he may have, and holds that he does not.

On page 179 of the opinion the court refers to Section 94 of the Code of Civil Procedure (Comp. Stat. 1922, Sec. 8610) providing that:

"The defendant may demur to the petition only when it appears on its face either, first, that the court has no jurisdiction of the person of the defendant or the subject of the action, etc."

And also refers to Section 96 (Comp. Stat. 1922, Sec. 8612) providing:

"When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objec-

tion may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, etc."

The court says:

"By this section it is expressly provided that the failure to make objection by answer, where the defect does not appear upon the face of the petition, shall be deemed a waiver of such defect; that is to say, the failure to raise by answer the question of jurisdiction, arising as it did in this case, must be deemed a waiver of all objections on that score. It is a harsh and unnatural construction, and one in direct contravention of the provisions of this section, to hold that by taking objections to jurisdiction in the manner provided thereby, the defendant waives the very objections he shall be deemed to have waived unless he proceeds in that very manner. In view of all the considerations to which attention has been challenged, we conclude that the district court erred in sustaining the objections made to the evidence offered for the purpose of showing that the court had no jurisdiction of the persons of the plaintiffs in error."

The first paragraph of the syllabus in *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897, is as follows:

"Under the provisions of our Code it is proper to plead as a distinct defense any facts not disclosed by the petition from which it appears that the court has not acquired jurisdiction of the person of the defendant or the subject of the action."

In the *Anheuser-Busch* case it appears that the plaintiff brought an action against Adolphus Busch and the Anheuser-Busch Brewing Association to recover damages which the plaintiff alleged he sustained by reason of the fact that the defendants "hauled and dumped" large quantities of earth onto a lot controlled by the defendants, which resulted in diversion of water upon the plaintiff's premises.

"Personal service of summons was made upon the defendant Busch in the city of St. Louis, in the state of Missouri, who entered a special appearance and moved to quash the service of summons against him on the ground that it was unauthorized by statute and void. Said motion having been overruled, he answered, first, challenging the jurisdiction of the district court, by proper averments alleging that the service of the summons in the state of Missouri was without authority of law and conferred upon the court no jurisdiction of his person; second, a plea to the merits, which need not be noticed in this connection. The Brewing Association filed an answer, which, after admitting its possession of lot 9 by virtue of a lease from its co-defendant, Busch, is in effect a general denial. Upon the issues thus formed a trial was had, resulting in a verdict against both defendants; whereupon separate motions were made for a new trial, which were overruled, and judgment entered in accordance with the verdict, and which is the judgment complained of in the proceeding.

"We will first consider the question of the jurisdiction of the district court of the defendant below, Busch. It is said by counsel for the defendant in error that that question is not presented by this record, for the reason that Busch submitted to the jurisdiction of the court by his answer to the merits of the case. There is to be found some support for that contention in the earlier cases in this court, but in *Hurlburt v. Palmer*, 39 Neb. 158, the cases were subjected to a careful examination, and the conclusion announced that under the provisions of the Civil Code it is proper to plead as a distinct defense any facts not appearing from the petition whereby it is made known that the court has no jurisdiction of the person of the defendant or the subject-matter of the action. That case we must regard as decisive of the question under consideration. It was the right and duty of the defendant Busch to direct the attention of the court to the fact that it had failed to acquire jurisdiction of his person by means of its process. That such facts constitute a defense within the meaning of Section 99 of the Code is clear from the reasoning in *Hurlburt v. Palmer, supra.*"

Section 8563, Compiled Statutes 1922 (referred to in the decisions hereinafter cited as Section 60 of the Code) provides:

> "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned."

In a number of cases, some of which we will refer to hereafter, a defendant was sued in a county in which he did not reside. He set up this fact in his answer, together with his defenses to the merits of the case. The plaintiff invariably insisted that by so doing the defendant entered a general appearance and that he waived the right to question the jurisdiction of the court. The Nebraska Supreme Court consistently held against this contention.

Stewart v. Rosengren, 66 Neb. 445, is such a case. It appears from the opinion in that case that Stewart sued Rosengren and Anderson in Lancaster County. Anderson resided in that county, while Rosengren resided in Saunders County, and summons was issued and served upon him therein.

> "In his answer, Rosengren set up these facts, among other things, and alleged that Anderson was a mere nominal defendant * * * and that he had been joined collusively for the purpose of enabling Stewart to sue Rosengren in another county than that in which he resided. * * *
>
> "If jurisdiction over residents of other counties may be obtained in actions upon contracts by the easy device of misjoinder of causes of action, the whole object and purpose of section 60, Code of Civil Procedure, will be thwarted. It is well settled that in an action within the purview of said section 60 in one county, against a defendant who has no real or bona-fide interest in the controversy between the plaintiff and a codefendant resident in another county, a summons cannot be issued and served upon the latter in such other county, and he may avail himself of the want of jurisdiction

> over his person by timely plea thereof. * * * This rule is based upon the policy of said section 60, that defendants, except in cases specially provided for, should be sued in the county where they or some of them reside, and is intended to prevent evasion thereof by joining nominal defendant. * * * It will not do to say that the defendants should be left to allege misjoinder, in which case the plaintiff, having brought his defendant into court, would sever, and thus attain his object of evading the provisions of the Code. Such a course savors too much of fictitious proceedings by *ac etiam* and *latitat* for a modern court. Hence, it was necessary for the plaintiff to show that both defendants were liable upon the contract on which he sued; for if Anderson was a nominal defendant as to the cause of action against Rosengren, without any real interest therein, the courts of Lancaster County could not try that cause of action on service in Saunders county merely because Anderson was joined as a defendant. * * *"

The defendant in the present case simply did what the State Supreme Court had held in many previous decisions it was his right and duty to do when he filed the motion to quash and thereby directed the court's attention to the fact that the suit was brought in the wrong county. (See *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb. 897, ante p. 25).

The plaintiff has cited and relies upon *United States v. Hvoslef*, 237 U. S. 1, and *Thames v. Mersey*, 237 U. S. 22. Each of these cases distinctly recognizes that if the defendant, as the defendant did in the present case, interposes proper objection to being sued in the wrong district, such action will prevent the jurisdiction of the court from attaching.

The Federal statute requires that where the jurisdiction is founded on the fact that the parties are citizens of different states, suits shall be brought only in the district where one of them resides.

The Court in *Western Loan Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, held that:

> "Where diversity of citizenship exists so that the suit is cognizable in some circuit court the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits."

This case also distinctly recognizes that if the defendant, as the defendant did in this case, in timely manner, interposes proper objection to being sued in the wrong district, such action will prevent the jurisdiction of the court from attaching.

As stated above, the defendant in the present case, in the manner established by the repeated decisions of the Supreme Court of Nebraska, interposed proper objection to being sued in the wrong district and he did not waive this right even if it could be waived, which we deny.

The rights granted by the orders of the Director General were not waived.

As stated by this court in the Wechsler case, "even if the order went only to the venue and not to the jurisdiction of the court," the Director General "plainly indicated that he meant * * * to insist that the suit was brought in the wrong county. His lawful insistance cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right."

In addition to this, the Supreme Court of Nebraska by repeated decisions had decided that a motion such as the

Director General filed in this case did not constitute a general appearance. The cases supporting this contention are cited on pages 17 to 19 of the petitioner's first brief. The practice of some of the states does not recognize the right to appear specially for any purpose, and in such jurisdictions one who voluntarily enters one of its courts for any purpose is deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, even though the appearance is special and entered for the sole purpose of objecting to the jurisdiction over his person. The decision of the State Supreme Court in the present case in effect, *for the first time,* adopts this rule of practice. Therefore, the Director General could not appear and assert that the suit was brought in the wrong county; or, in other words, he could not object to the venue without appearing and submitting himself to the jurisdiction of the court. This is all he did do by the motion to quash. In other words, the court held that by asserting that he could not be sued, except in the jurisdiction prescribed by his orders, he waived his exemption from suit in the county where the suit was brought.

The State Supreme Court further held that the action is "both local and transitory under General Order 18-A, and the District Courts of this state had jurisdiction over the subject-matter of such action." So far as we know, this question has never been decided by this court and this is one of the questions now before it for decision. In *Camp v. Gress,* 250 U. S. 308, 311, the court says:

> "First. The several defendants below, although not citizens of the same State, were all citizens of States other than that of the plaintiff. Hence, the diversity of citizenship requisite to federal jurisdiction existed. *Sweeney v. Carter Oil Co.,* 199 U. S. 252. The objection of John M. Camp is not to the jurisdiction of a federal court but to the jurisdiction over him of the court of the particular district; that is, the objection is to the venue. He asserts the personal privilege not to

be sued in a district other than that of his residence, since the action is not brought in the district of the plaintiff's residence. If he were a sole defendant, or if none of the defendants resided in the district where suit was brought, the privilege asserted would be supported by the very language of the statute."

In the present case the Director General by his motion to quash asserted his privilege not to be sued in a county or district other than that of the residence of the plaintiff, or that of the place where his cause of action arose, and the privilege asserted is supported by the very language of the orders of the Director General. General Order No. 50 authorizes suits to be brought against him, subject, however, to the provisions of General Orders Nos. 18 and 18-A. When the plaintiff accepted the benefit of that part of the order which permitted him to bring his suit against the Director General, he was required also to accept that part of the orders which provided where the suit should be brought. It seems to us that under the orders of the Director General it was essential to the jurisdiction that the suit be brought in the county or district where the cause of action arose, or where the plaintiff resided, and that the courts of any other county or district were without jurisdiction.

The failure of the defendant to file a cross-appeal is immaterial to this proceeding.

On page 8 of his brief the respondent says:

"The Supreme Court of Nebraska disposed of the (jurisdictional) question upon the specific grounds that the former opinion, holding this question to have been foreclosed by failure to cross-appeal, was also settled under the law of the case."

The Supreme Court on the first appeal held that this question was not before it because the defendant had failed to interpose a cross-appeal and declined to pass upon it. The first appeal, therefore, did not settle this question one way or the other. On the second appeal the court did not

decline to pass upon this question on the ground that the defendant had failed to interpose a cross-appeal in the first appellate proceeding, but on the contrary disposed of the question by deciding that the action is both local and transitory under General Order No. 18-A and that the District Court had jurisdiction over the subject-matter of the action, and further deciding that "where the Director General specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well-founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer". (R., p. 196.)

The failure of the defendant to file a cross-appeal in the first proceedings is not mentioned by the court in its opinion on the second appeal, and the inference of the respondent that the Supreme Court declined to pass upon the jurisdictional question on the second appeal, on the ground that the defendant had failed to interpose a cross-appeal in the first appellate proceeding, is not in accordance with the facts disclosed by the record. The State Supreme Court did not rest its judgment upon a non-federal ground, but on the contrary passed upon and decided the federal questions raised by the defendant, and the contention that these questions are not before this court because the petitioner failed to file a cross-appeal in the first appellate proceeding in the State court, is without merit.

In addition to this, there is no statute in Nebraska on the subject of cross-appeals. The only thing on this subject is a rule of the Supreme Court which provides that an appellee "may take a cross-appeal by filing with the Clerk * * * a praecipe * * *". It is not the practice under this rule for the appellee to file a cross-appeal where the judgment appealed from is in his favor, so in the present case the defendant could not have prosecuted a cross-appeal in the first appellate proceeding because the judgment from

which the plaintiff appealed was in favor of the defendant. (See *Bragonier v. Stevenson,* 104 Neb. 578; 3 C. J. 635, note 40(a); *Midland Valley R. Co. v. Fulgham,* 181 Fed. 91, 95; *Rogers v. Penobscot Mining Co.,* 154 Fed. 606-610).

The other questions presented by the record are fully discussed in the petitioner's first brief and we will not lengthen this brief by adding to what has already been said.

Respectfully submitted,

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I.

PETITION FATALLY DEFECTIVE.

The petition for writ of certiorari filed herein is fatally defective in the following particulars, viz:

a. The Exhibit Does Not Include All Proceedings.

Section 3 of Rule 37, Rules of the Supreme Court of the United States, provides:

> "3. Where an application is submitted to this Court for a writ of certiorari to review a decision of * * * any * * * court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of *the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed.*" * * *

All proceedings had on first trial of this action in the District Court of Douglas County, Nebraska, and in the Supreme Court of Nebraska on first appeal prior to its decision are omitted in the exhibit to the petition. The only exception are the pleadings and Petitioner's so-called Special Appearance and ruling thereon. This omission is patent from the petition and the exhibit showing the two opinions of the Nebraska Supreme Court on the respective appeals (Rec. pp. 300, 322), and from Petitioner's brief, wherein he mentions rulings had on the first trial and appeal.

All questions Petitioner seeks to have reviewed are questions settled in the state court by the first appeal—except the one question of substitution of defendant Davis, Agent of the Government, taken up later.

The Supreme Court of Nebraska from an analysis of the evidence found sufficient facts to prove Petitioner guilty of "palpable negligence;" that Respondent was injured in interstate commerce; that he did not assume the risk. It further found that Petitioner's special appearance objecting to venue of the action was not reviewable for non-compliance with established rules of practice and procedure.

Without the record below this Court has not the means of ascertaining whether the conclusions reached by the Supreme Court of Nebraska in regard to the case being governed by the Federal Employer's Liability Act were wrong; whether Petitioner waived right of review of any or all of these questions; whether a Federal right was insisted upon by Petitioner; whether waived by his action or non-action; whether any specific assertion of Federal right was made separate from a general claim of "insufficiency of evidence," or even that objection was made; whether, in short, it is a case over which this Court has jurisdiction.

This Court, in adopting the rule quoted above, layed down a condition precedent to be complied with before a writ of certiorari would be granted. It is held as a general rule of law that non-compliance with requirements (statutory or by rule of court) as to exhibits to be attached to petition will invalidate the application. 11 C. J. 153; 11 C. J. 148.

Various state courts have held a like rule to constitute such condition precedent. Accordingly the Supreme Court of Louisiana refused to consider an application where copy

of opinion of the Court of Appeals was not annexed to the petition as required by its rules. Brown Shoe Co. v. Hill, 51 La. Ann. 920, 25 So. 634. In Montana State v. Second Judicial District Court, 26 Mont. 224, 79 Pac. 114, the Court denied a writ of certiorari for non-compliance with its rule that a copy of the order complained of be attached to the petition. In Ex rel Pedigo v. Robertson, 181 S. W. 987, the Supreme Court of Missouri dismissed a writ of certiorari where its rule that opinion of the Court of Appeals as well as its entries and judgment be set forth in the application was not complied with.

The violation was premeditated and with a purpose as will be hereinafter disclosed.

b. The Petition Is Not in Proper Form.

Section 3 of Rule 37 of this Court further provides:

> "* * * The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition."

A like requirement was interpreted in Sigafus vs. Porter, 85 Fed. 689, to mean fundamental and not evidenciary facts. Petitioner has so vaguely and indefinitely pleaded evidence and cited authorities and injected so many points not previously specifically claimed on a Federal right that it is difficult to perceive his propositions. Central Vermont R. Co. v. White, 59 L. Ed. 1433.

c. Jurisdictional Facts Not Alleged.

The petition nowhere alleges the judgment sought to

be reviewed to have been either (1) final or (2) to have been rendered by the highest court of the State. This court can review by certiorari only "final judgments" rendered by the "highest court of a state in which a decision in the state court be had." Jud. Code, Sec. 237, as amended, Act Dec. 23, 1914, c. 2, and Act Sept. 6, 1916, c. 448, sec. 2. That jurisdictional facts must be alleged is elementary.

II.

DECISION ON VENUE OF ACTION NOT REVIEWABLE.

Complaint is made by Petitioner that the Supreme Court of Nebraska refused to sustain a so-called special appearance objecting to the venue of the action. We will first show this objection not to be reviewable because (a) foreclosed by prior decisions of this Court and (b) that the decision was based upon non-Federal grounds.

a. Foreclosed by Prior Decisions.

The mere fact that this question of venue arises under the Transportation Act raises no new question. It is controlled by the same considerations as stated in United States v. Hvoslef, 237 U. S. 1, 59 L. Ed. 813, wherein the Government consented to be sued for recovery of stamp taxes wrongfully collected, but provided action should be instituted *in the county wherein plaintiff resided.* The Court held:

> * * * "The requirement as to the particular district within which the suit should be brought was but a model and formal one, which could be waived." * * *

This principal is likewise thoroughly established in the following additional cases:

Thames v. Mersey M. Ins. Co. v. United States, 59 L. Ed. 821, 237 U. S. 22;

Fitzgerald & Mallory Con. Co. v. Fitzgerald, 52 L. Ed. 904;

Western Loan & S. Co. v. Butte & B. C. Min. Co., 210 U. S. 368, 52 L. Ed. 1101;

St. L. & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. Ed. 659;

Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 40 L. Ed. 401;

In re Moore, 209 U. S. 490, 52 L. Ed. 904.

The law that objection to venue can be waived has been "so explicitly foreclosed by these prior decisions of this Court that it is no longer open for argument." Therefore, cannot be made the basis for a write of certiorari under authority of Leonard v. Vicksburg S. & R. Co., 198 U. S. 416, 49 L. Ed. 1108; Mples. St. P. & S. S. M. R. Co. v. Merrick Co., 254 U. S. 376, 65 L. Ed. 312; Mo. Pac. R. Co. v. Orzo Castle, 244 U. S. 541, 56 L. Ed. 875. Besides this question of waiver is a question of general law as shown in the following particular.

The manner in which it may be waived is a question of practice governed by State procedure.

Roberts, "Federal Liability of Carriers," Vol. 1, p. 733, Sec. 427;

Richey, "Federal Employer's Liability" (2nd Ed.), Para. 123;

Second Employer's Liability Cases, 223 U. S. 1, 56 L. Ed. 327;

Central Vt. R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433;

Kansas Cy. West. R. Co. v. McAdow, 240 U. S. 51, 60 L. Ed. 520, 522;

Mahr v. U. P. Co., 140 Fed. 921;
State v. Grimm, 239 Mo. 135.

As hereinafter shown the State Court held the objection had been waived.

b. Decision Based on Non-Federal Grounds.

The question in sequence is, what of its disposition under Nebraska practice?

The Court in its opinion on second appeal in commenting stated that under its practice a request for a decision upon its power to consider cases of this class was too broad for a special appearance objecting to jurisdiction over the person. Such a broad special appearance invoking so much, constituted a waiver of objection to jurisdiction over the person or a waiver of the privilege of choosing venue. In addition, the court in this opinion called attention to Petitioner's failure to offer evidence in support of his special appearance adopted as his chosen form of attack; to his failure to object during the trial to jurisdiction over the person and his failure to file a motion for rehearing.

This action of the Court under all circumstances was not a decision of a Federal question, but one of general principles of law, viz: waiver. It was a non-Federal question, because it was a state practice decision and that decision was on whether or not certain facts constituted a waiver, under Nebraska practice. No record of the former trial of this case being presented the *evidence* of waiver is suppressed. Therefore, the opinion ought not be impunged in any respect.

The question decided was not the denial of any Federal right asserted. It is not asserted if waived, because a waiver is a withdrawal. No such privilege was properly and specifically insisted upon to be denied. In fact the Court merely discussed these questions as related. Its real or most pronounced decision was that these things were all foreclosed in the previous trial and appeal and then the Court said:

> "No motion for a rehearing was made in this court after the filing of the former opinion in this case, and the former decision of the court has become the law of the case."

In no wise did the Court ever attempt to interpret General Order No. 18-A or any other Federal rule or statute. Petitioner never did specially point out and claim any Federal privilege other than the first special appearance overruled because of failure to sustain the same with evidence which was abandoned by Petitioner. There was no denial upon that score.

The Supreme Court in its opinion on first appeal (Rec. p. 322) refused to consider this objection for the reason:

> "Defendant filed a special appearance objecting to the jurisdiction of the Court over the person of defendant and *over the subject-matter of the action*, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was

> again urged in the answer, and, by brief filed out of time by leave of Court, it is sought to be urged now. *But no cross-appeal* from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now. See subdivision (b) of rule 18 of this court, 172 N. W."

This decision was not upon a Federal question but clearly upon an established rule of practice. This Court passed upon this question in Tripp v. The Santa Rosa St. Ry. Co., 144 U. S. 126, 36 L. Ed. 371, and so decided. Nor was it a special rule of practice made and invoked in an attempt to evade the decision of this question, but was a long established printed rule of practice. By it no "right, privilege or immunity" claimed under a statute of the United States "especially set up and claimed" was denied. Petitioner simply ignored the rule, pointing out the manner of procedure. He failed to make a claim. The Supreme Court of Nebraska refused to permit a violation of one of its rules by permitting this question to be injected into the case at that belated time.

Nor, as above stated, were any Federal questions discussed, involved or decided on second appeal. The Court confined its discussion to the fact that under Nebraska practice an instrument which includes with an objection to jurisdiction over the person a request for a ruling as to the Court's jurisdiction over the subject-matter was too broad for a special appearance,—that it constituted a general appearance and a waiver of objection as to jurisdiction over the person and venue. In addition the Court called attention to other waivers made by Petitioner's failure to offer *any proof* in support of his claim that Respondent was not a resident of Douglas County, Nebraska; by his failure to

object during trial to the Court's jurisdiction over his person, although he may have moved for dismissals on the general grounds that no negligence was shown, which is not a specific claim of Federal right; and by his failure to file a motion for a rehearing on first appeal. The court's decision on this point, however, is embraced in the following language:

> "No motion for a rehearing was made in this court after the filing of the former opinion in this case, and the former decision of the court has become the law of the case.

Such decision and discussion was not upon a Federal question, but upon general principles of law and state practice, viz: waiver. Under authority of Atlantic C. L. R. Co. v. Mims, 37 Sup. Ct. Rep. 188, 242 U. S. 532, 61 L. Ed. 476, this Court has no jurisdiction to review:

> " * * * To become the basis of a proceeding in error from this court to the supreme court of a state 'a right, privilege, or immunity' claimed under a statute of the United States must be 'especially set up and claimed,' and must be denied by the state court. Rev. Stat. Sec. 709, Judicial Code, Sec. 237 (36 Stat. at L. 1156, chap. 231, Comp. State. 1913, Sec. 1214). This means that the claim must be asserted at the proper time, and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375), *and upon the question whether or not such a claim has been so asserted the decision of the court is binding upon this court*, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right. Central Vermont

R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; Erie R. Co. v. Purdy, 185 U. S. 148; 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137;

"* * * While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which * * * this court can review (Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149; 17 Sup. Ct. Rep. 709), and therefore, for want of jurisdiction, the writ of error is dismissed."

No record of the first trial of this case being contained in Petitioner's exhibit to his petition the waivers found therein by the Supreme Court of Nebraska must be deemed to exist, and the objection waived. A question waived in a State court will not be reviewed here.

Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. ed. 273;

Tripp v. Santa Rosa St. Ry. Co., 144 U. S. 26, 36 L. ed. 371.

III.

SUBSTITUTION OF PARTY DEFENDANT CURED BY WINSLOW ACT.

As stated by Petitioner on page 6 of his Petition the action was commenced January 9, 1920, when Walker D. Hines was Director General of Railroads. Thereafter through successive changes related, James C. Davis became Federal Agent under the Transportation Act. On May 31, 1922, the court upon Respondent's motion, substituted Mr. Davis as defendant.

Whatever error may have existed is now cured by the provisions of the Winslow Act, which passed the House of Representatives February 19, 1923, the Senate March 2, 1923 and was approved by the President March 3, 1923; this Act amended Section 206 of the Transportation Act, 1920, by adding at the end thereof two new subdivisions reading as follows, viz:

> "(h) Actions, suits, proceedings, reparation claims, of the character described in subdivision (a), (c) or (d) properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office. Nor shall any action, suit or other proceeding hereto-

fore or hereafter brought by any public officer or official, in his official capacity, to enforce or compel the performance of an obligation due or accruing to the United States arising out of Federal court control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

"(i) Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect."

There is, therefore, no question involved in this assignment for review in this court.

IV.

TRIAL QUESTIONS UNDER LIABILITY ACT.

Having disposed of all other questions we come next to a consideration of the questions of sufficiency of evidence to show Respondent to have been injured by Petitioner's negligence while engaged in interstate commerce and to have not assumed the risk; we will first show (a) that the

right of review of these questions has been waived and (b), that they are so wholly without color of merit for various reasons as to afford no basis for the issuing of the writ.

a. Right to Review Waived.

As before stated these questions were settled on first appeal of this action, as shown by the two opinions (Rec. p. 300, 322). Petitioner did not file a motion for rehearing.

Section D, Rule 8, of the Supreme Court of Nebraska (page viii, 172 N. W.) provides:

> "All motions for rehearing * * * *may be filed as of course* at any time within 40 days from the filing of the opinion of rendition of the judgment * * * "

The right to file a motion for rehearing is absolute and a matter of *right*—not, as in Federal courts, a matter of *discretion.*

Rule 9 of said Court provides that *no mandate will issue* during such period of time, or, in event the motion be granted, pending consideration thereof. The effect of these provisions is to (1) inform the parties of the court's opinion of the matters involved and, (2) grants the parties 40 days within which to correct any claimed error before the decision is enforced.

Therefore, in the event a party believes the decision to be erroneous in whole or in part, an adequate remedy is afforded him to correct any claimed error therein and the Supreme Court retains jurisdiction for 40 days that this may be accomplished.

Under Nebraska practice a litigant is required to take advantage of this remedy and to point out any alleged error in the decision by motion for rehearing. If he permits the judgment to become final for lack of such motion he is estopped from thereafter contending the decision erroneous. This is also a question of settled Nebraska practice.

> "If our former conclusion was erroneous, the defendant *should have* obtained a correction of the error by presenting a motion for rehearing . . . " *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349.

> "(Where) *No motion for a rehearing was filed*, nor * * * any objection made to the *decision of the* court . . " the questions will not be again considered . . " *O'Donahue v. Hendrix*, 17 Neb. 287.

Indeed, this Court has recognized this requirement of State Court practice of asking for a rehearing if not satisfied with the decision of a court on first appeal or when desiring a modification of the mandate.

> Rio Grande Western R. Co. v. Stringham, 60 L. ed. 136, 239 U. S. 44.
>
> *Norfolk S. & R. Co. v. Ferebee*, 238 U. S. 270, 59 L. ed. 1303.

The decision on first appeal was permitted to become final by Petitioner without one word of protest, without any suggestion to the Court that Petitioner claimed a Federal right specifically set up and claimed by him was being denied him—or, in fact, that any right was being denied him. There is a vast distinction between a decision which becomes final after an exhaustion of remedies afforded and one which becomes final because of the laches of a party.

In the first class the decision becomes final *over the protest* of the unsuccessful party and in spite of all he can do and in the second class its finality, as a decree binding upon him, is accomplished by reason of his non-action or consent. Petitioner was apparently satisfied that a Federal right had not been denied by the first appeal and apparently satisfied with the opinion. The conduct under Nebraska practice is a waiver and was so held to be a waiver under our practice.

Petitioner was bound to try his action in accordance with the established practice in Nebraska and to fully pursue the remedies it afforded him. He had failed to ask a reconsideration of those findings. He cannot ignore the machinery the state court afforded him to obtain relief by circumventing positive right of review. He became estopped from denying this accepted order. He will not be permitted to take the attitude of saying to a state court "You have erred, but I will not follow your procedure and have you correct it, but will leave the error uncorrected. I will obtain its correction in the Supreme Court of the United States."

Relief being available to him in the original proceedings this Court will not hear him. The law is stated in note to Wulzen vs. Board of Supervisors, 40 A. S. R. 17 (loc. note, p. 30):

> "It follows from the rule that certiorari issues only when there is no adequate remedy at law that among the questions which cannot be presented by it, where this rule prevails, are included all those which in the particular case might have been reviewed by appeal, writ of error, *motion for new trial, or other*

appropriate proceeding of which the party might have availed himself either in the appellate court or in the court in which the action against him was taken, provided such court had jurisdiction of him and of the subject-matter of the action or proceeding; nor can he maintain his claim to the writ on the ground that the time within which he might have appealed, or otherwise sought redress has expired, unless, perhaps, where he can show that his failure to avail himself of the remedy which he might have pursued was not due to any negligence or fault on his part. (Citing many cases)."

In *People v. Pilot Commissioners*, 37 Barb. (N. Y.) 126, the court applied this common law rule to failure to request rehearing.

The Supreme Court of Louisiana adopted this common law rule as a rule of court and in at least the three following cases the failure of the Petitioner to request a rehearing in the court below was decreed fatal to the granting of the writ.

Colomb vs. Rolling, 106 La. 37, 30 So. 293;

In re Huddleston, 106 La. 594, 31 So. 147;

Frellsen vs. Ruddock Cypress Co., 108 La. 37, 32 So. 169;

Nor will the assumption be indulged that the Supreme Court of Nebraska would not have corrected error if such error existed:

" . . We cannot assume that that body will necessarily adhere to their previous decision; but on the contrary must assume that if that body is convinced, on a rehearing, that the former decision was erroneous

either upon the facts or the law, it will promptly reverse its decision . . . " People v. Pilot Com'rs. 37 Barb. (N. Y.) 126.

Relief being *available* but not insisted upon in the original proceedings this court will not take jurisdiction of this action.

If follows that any objection that Petitioner may have had to the decision of the court on first appeal was waived by his failure to avail himself of relief in the original proceedings by motion for rehearing. And a question waived in the state court will not be reviewed here.

Richmond Min. Co. vs. Rose, 114 U. S. 576, 29 L. ed. 273;

Tripp vs. Santa Rosa St. Ry. Co., 144 U. S. 26, 36 L. ed. 371.

b. Questions Wholly Without Merit For Various Reasons.

In addition to these questions having been waived by failure to file motion for rehearing as hereinbefore shown they are so wholly without even color of merit as to raise no question. Insofar as the question of whether or not Respondent was injured in interstate commerce is concerned this question has been so "explicitly foreclosed by prior decisions as to afford no basis for the writ." The questions of negligence, assumption of risk and instructions are questions that are determined by broad principles of general law. They involve no construction of Federal Statutes. The Federal Employer's Liability Act does not attempt to define negligence but leaves it to be determined according to the rules of practice and procedure of the various state courts in accordance with the principles of general law.

We shall now proceed to show (1) that the question of whether Respondent was in interstate commerce has been "explicitly foreclosed by prior decisions" and then, (2) proceed to show the utter lack of even color of merit in the remaining questions.

(1) *Interstate Commerce Question Closed by Prior Decisions of This Court.*

Respondent was injured while preparing a cable sling for gantry crane to enable it to be continued in its use for handling load of telephone poles and similar loads. Such preparatory act was within interstate commerce.

North Car. R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591;

So. R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321;

Louis. & Nash R. Co. v. Parker, 242 U. S. 13, 61 L. ed. 119.

The telephone poles were moving in interstate commerce from St. Paul, Minnesota, to St. Edwards, Nebraska; the poles had shifted so as to need readjustment. The sling was to be placed about the poles to permit the gantry crane to elevate and adjust them on their car and hence permit their continued movement in interstate commerce. Such act was necessary to their continued movement—hence an act in interstate commerce.

So. R. R. Co. vs. Puckett, supra;

Johnson v. So. Pac. Co., 196 U. S. 1, 49 L. ed. 363.

Slings are necessary equipment of the gantry crane. Without them the gantry cannot be used. A hook, attached

to another cable which, in turn, is attached to the elevating machinery of gantry, is slipped into the sling. If the load is merely out of adjustment it is properly adjusted on its present car. If the car be in bad order the load is transferred into a good order car. These slings are made of rope, chains and cables and used according to their adaptability to the materials to be handled. For instance, cable slings are preferrable in handling wood objects (Ques. 810) such as telegraph poles. Now slings are constantly being needed, hence a supply of rope was kept on hand for making rope slings (Ques. 878, 879) and cable to make cable slings (Ques. 908) as well as other materials for supplying worn out parts of gantry (Ques. 882). The gantry crew made these repairs.

Respondent was injured while preparing a cable sling to take the place of one previously in use (Ques. 887). The sling at the time of the injury was actually attached to the gantry. The act being performed was, then, more than being *preparatory*, one of *present repair* to the going gantry—an operating interstate instrumentality. As much so as the supplying of a new cog-wheel to its running machinery, or the putting of a draw bar in a car of a train in transit. *Walsh v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1. It is like putting a new bolt into an interstate bridge in use. *Pederson v. Del. & Lac. Ry. Co.*, 229 U. S. 146, 57 L. ed. 1125.

Had Respondent been injured by negligence attributable to Petitioner while Respondent was merely at his place of employment he would be entitled to recover. Respondent's duties were exclusively confined to those connected with the use of the gantry—an interstate instrumentality.

He was required to be there during certain hours—was not permitted to leave. If no cars were immediately available he was required to await their arrival. "He was none the less on duty when waiting. His duty was to stand and wait." *M. K. & T. Ry. Co. v. U. S.*, 231 U. S. 112, 58 L. ed. 144; *Johnson v. So. Pac. R. Co.*, 196 U. S. 1, 49 L. ed. 363.

(2) *No Color of Merit.*

While the question of whether plaintiff was injured in interstate commerce has been (immediately supra) specially treated, because so specifically foreclosed by prior decisions of this court, yet it is also not to be considered for other reasons. The foregoing question as well as the questions of whether plaintiff was guilty of negligence, whether Respondent assumed the risk and the instructions to the jury are wholly without even color of merit. The broad principles found in the following excerpts apply to all these elements with equal force. We again call the Court's attention to the fact that the determination of negligence and assumption of risk are not defined in the Employer's Liability Act but they are jury questions to be determined under general principles of law.

The Court's attention is directed to the following extracts of complaints similar in a general way to those of Petitioner upon trials had under procedure recognizing all provisions of the Federal Employers' Liability Act. We believe that in all cases where a petition in error would be dismissed for lack of merit a writ of certiorari will be denied.

"The case, then, is one in which there is no question as to the interpretation of any provision of the Federal act, or as to the definition of legal principle in its application, *but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable.* The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. Seaboard A. L. R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Seaboard A. L. R. Co. v. Koennecke, 239 U. S. 352, 355, ante, 324, 327, 36 Sup. Ct. Rep. 126. Judgment affirmed." *Great Northern R. Co. v. Knapp*, 60 L. ed. 751.

"Its tendencies involving no matter of doctrinal importance, for this reason and additionally in view of the fact that both the courts below have concurred in holding that there was not sufficient ground to take the case from the jury, we think it is unnecessary to state the proof and its tendencies, and we therefore content ourselves with saying that the contention that error was committed *in not taking the case from the jury is found*, after an examination of the record, *to be without merit*..

"In the argument a contention was urged based upon some expression made use of by the trial court in refusing the request to take the case from the jury. Although we have considered the proposition and find it *totally devoid of merit*, we do not stop to further state the contention or the reasons which control us concerning it as we think it is manifestly and after-

thought, as it was *virtually* not raised in the trial court, and was not *included in the assignments of error made for the purpose of review by the court below*, nor in those made in this court on the suing out of the writ of error." *Seaboard Air Line Ry. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777.

"As to other questions of Federal character, they may be briefly disposed of. It is insisted that the trial court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charges to the jury as given. The trial court charged that, in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the supreme court of the state rightly affirmed the judgment in that respect. * * * (citations.)

"The court properly refused the request as to contributory negligence and gave the rule laid down in the employers' liability act. As to assumption of risk, the supreme court held that no such issue was made or submitted to the trial court (a conclusion fully supported by the record), and therefore under the state practice no question concerning that subject was presented on appeal. This conclusion denied no right of a Federal character. Judgment affirmed." *So. Ry. Co. v. W. L. Lloyd*, 239 U. S. 496, 60 L. ed. 402.

* * * "5. The refusal of a state trial court, sustained by the state court of last resort, to take from the jury an action under the Federal employers' lia-

bility act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sect. 8657), by directing a verdict for defendant, will not be disturbed by the Federal Supreme Court on writ of error unless clearly erroneous." * * *

"2. Questions in a suit under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sect. 8658), which relate to matters of pleading, to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial courts involving no construction of the Federal statute, cannot be considered on a writ of error from the Federal Supreme Court to a state court." * * *

"7. Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the 'clearance card' and the refusal to permit the railway company to show that, under the Federal law, all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute, and neither directly nor indirectly affect any Federal right. Those assignments, therefore, under Judicial Code, sect. 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, sect. 1214), Rev. Stat. sect. 729, will not be reviewed on a writ of error to a state court. Seaboard Air Line R. Co. v. Duvall. See also Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, and Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, ante, 277, 35 Sup. Ct. Rep. 130, which state the rule where similar cases are brought here by writ of error to a Federal court.

"Judgment affirmed." *Central Vermont R. Co. v. White,* 59 L. ed. 1433.

* * * "Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong.

"Judgment affirmed." *Louisville & N. R. Co. v. Stewart,* 60 L. ed. 989.

As shown by the opinion of the Supreme Court of Nebraska on first appeal (Rec. p. 326) it is related that, the crew were instructed by its foreman to bind the jagged ends of the cable with cloth; no cloth or wire was available in the tool house; the foreman instructed the crew to find some; one of Respondent's fellow workmen found a piece of wire in an empty coal car; this wire had a metal cylinder (detonator) thereon; he attempted to twist this cylinder off and in so doing powder substance spilled out of it; the thought of an explosive suggested itself to him—a fire-cracker. With these suggestions and evidences of danger he gave it no inspection, but merely exhibited it to the foreman who directed its use. A portion of the wire he cut off with a hammer, giving the balance—with no warning—to a mere boy of 18, who proceeded to straighten it to use in binding the cloth on the cable.

Respondent had no knowledge of the wire's having been obtained from a coal car, of the yellow powder; that no inspection had been given it. But he, a mere boy of 18 years, relying upon its being given him by an older and more experienced workman and his foreman's direction to use it he attempted to straighten the wire that the fellow-servant had crumpled and in so doing the cylinder exploded and his eyes were blinded.

The duties of the master to furnish safe materials and,

as a necessary corollary, to properly inspect and test these materials, is too well established to need citation. The conclusion reached by the Supreme Court of Nebraska that Petitioner was guilty of "palpable negligence" and that Respondent had not assumed the risk are so firmly established as to be "explicitly foreclosed by former decisions."

The Supreme Court of the United States has held they would not disturb such a decision unless there was "palpable error." The Supreme Court of this State on these facts held there was "palpable negligence." This is absolutely no open question on the merits. All had been adjudicated on the first appeal and nothing is worthy of this Court's consideration. The writ should be denied.

(*Alleged error in instructions without color of merit.*)

Petitioner's claim of error concerning the instructions, as appears on pages 31 and 32 of his brief, is that issues as to negligence were submitted to the jury with no proof to support them. The utter lack of even color of merit in such contention is readily apparent.

Instructions Nos. 1, 2 and 3, respectively informed the jury of the allegations of the petition, answer and reply respectively,—a statement of the issues raised by the pleadings as required by Nebraska practice. *Home Savings Bank of Stewart*, 78 Neb. 624, 110 N. W. 947.

Instruction No. 4 told the jury to find for Respondent provided he established the propositions he alleged, but if he failed to establish "*any or all*" of such propositions the verdict should be for Petitioner.

All reference as to negligence on part of Petitioner appears in th efollowing excerpt from Instruction No. 1:

> "Plaintiff further alleges that the defendant neglected to provide wire and tools proper to operate or repair said machinery, and that the foreman in charge told his subordinates to provide wire for such work; that one of defendant's agents found wire in an empty coal car and brought it to the foreman who directed its use by his subordinates, without carefully examining the same and that he failed to see and know its dangerous condition; that there was a metal cylinder on said wire containing an explosive, not known to plaintiff, and which wire and cylinder was negligently given plaintiff by defendant's employee." * * *

This instruction told the jury that Respondent *claimed* Petitioner undertook a repair *without having on hand sufficient and proper materials therefor*—it described a situation. That with this scanty situation and because thereof Petitioner then directed materials be found to supply the same and, accordingly, one of the employes did find a wire in an empty coal car. This spurious wire so fouund had thereto a metal cylinder containing an explosive. Petitioner, without any inspection thereof, directed its use and it was given Respondent.

Proof of such elements, in addition to the findings of the Supreme Court of Nebraska, is affirmatively shown by Petitioner's brief. On page 19 thereof appears the following from his abstract of plaintiff's testimony:

> (After narrating Foreman Turner's order to bind a cloth about the jagged ends of the cable, and his

statement that they must have some wire to fasten the cloth on.)

> "There was no suitable wire in the tool house and this fact was reported to Foreman Turner and 'He said to see if we could find some.' This order was given 'to the gang' (Rec. p. 79, Qs. 60 to 65). 'My uncle * * * found some wire in the empty coal car. I did not know where he got it from at that time.' He brought the wire up to 'where they were working and showed it to the foreman, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful of it or there would not be enough of it to do the work with.'"

Similar statements appear in Petitioner's abstract of testimony appearing upon pages 18 to 25 of Petitioner's brief, showing there was no serious dispute upon the facts stated in the instructions but that Petitioner as the Supreme Court of Nebraska stated in its opinion (Rec. p. 323) relied upon the theory that Respondent when injured was merely "satisfying his idle curiosity." Petitioner's contention was without support in the testimony, as shown by his abstract. Even if it had been supported by inference of counsel it was also clearly disputed, raising an issueable fact which the jury resolved against Petitioner.

It clearly appears from the foregoing that there was abundant evidence on the questions of negligence and assumption of risk to be submitted to the jury and likewise ample evidence to support the claimed acts of omission and commission recited in the instruction as constituting negligence on the part of Petitioner. So much evidence in fact that petitioner's statement that there was *no* evidence in support thereof is wholly without color of merit, and such

statement cannot be made the basis for the issuance of a writ of certiorari.

> "The bare averment of a Federal question is not sufficient, there must be at least color of ground for such averment."
>
> *Hamlin vs. Western Land Co.*, 174 U. S. 531; 37 L. ed. 267.

There was ample evidence of acts on the part of Petitioner which if resolved against him by the jury would constitute negligence—in fact the Supreme Court of Nebraska reached the conclusion that Petitioner was guilty of "palpable negligence." It is apparent therefore that what Petitioner seeks is that this Court decide the issues of fact—whether Respondent was injured as he and the other witnesses testified, or whether he was injured in the manner *inferred* by Petitioner. This Court has often decided that it is not a Court of general review of issues of facts on appeals from State Court. Louisville & N. R. Co. vs. Stewart, 60 L. ed. 989.

We respectfully submit the writ of certiorari should be denied.

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